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Sup. Court, U. S.
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IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 19____

No. 72-106

C. E. BRADSHAW, SR.,
Petitioner,

vs.

VIC THOMPSON, et al,
Respondents.

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals
for the Sixth Circuit

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Downie v. *Powers*, 193 F.2d 760, (10th Cir., 1951)

Garrison v. *Warner Bros. Pictures, Inc.*, 226 F.2d 354 (9th Cir., 1955) cert. den. 76sCt. 438, 350 U.S. 968, 100 L.Ed. 841.

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Payne v. S. S. *Nabob*, 302 F.2d 803 (3rd Cir., 1962)

Tobin v. *Chambers Construction Co.*, 106 F.Supp. 473 (D.C., Neb., 1952)

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, **infra** p. 11 is presently unreported.

JURISDICTION

The judgement of the Circuit Court of Appeals was entered on January 20, 1972. Rehearing was denied April 21, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On July 10, 1969, C. E. Bradshaw, Sr., filed his complaint in the United States District Court for the Eastern District of Tennessee against Vic Thompson, et al. Jurisdiction of the District Court was invoked by reason of diversity of citizenship; the Petitioner being a citizen of Florida and the Defendants being citizens of the State of Tennessee.

Plaintiff had delivered to Defendant, Vic Thompson, some 60 Tennessee walking horses for disposition at the best and highest cash sales price. Defendant Thompson enlisted Defendants Martin and Brandon as sub-agents selling numerous of Plaintiff's horses through or to them. Defendants Thompson, Martin and Brandon finally disposed of the bulk of the remaining animals at an auction sale operated by Defendant Beech.

The Amended Complaint alleged fraud, conspiracy, breach of contract and breach of fiduciary duty and sought punitive damages. Because of the complexity, number and geographic distribution of transactions involved in disposing of the horses, Plaintiff sought an equitable accounting to recover secret profits, kickbacks and commissions received by Defendants Thompson, Martin and Brandon.

Concerning Defendant Beech, the allegations were that one particularly valuable animal, "Rambler's Image B", had been submitted for sale at Beech's auction in such a fashion as to disguise his true value, thereby enabling Brandon's wife to purchase the horse at an unreasonably low price. The complaint alleged that Plaintiff telephoned the Beech auction, was told the horse had not yet been sold, and that Beech's representative was thereupon instructed to "no sale" the horse. Furthermore, despite Plaintiff's instructions, Beech's secretary, Mrs. Barbara Wiggins, was instructed to execute registration papers on the horse despite Plaintiff's instruction to the contrary.

Plaintiff's prayer for an equitable accounting was

denied at several junctures, and through trial Plaintiff bore the burden of proof as to damages.

Extensive discovery was had on Plaintiff's part and pre-trial conference required two full days. Eighty-three detailed and lengthy stipulations were included in some sixteen pages of the pre-trial order. That order also contained the notation:

> The Plaintiff is unable to disprove various assertions of fact advanced by the Defendants and can neither admit or deny them. He insists upon the right to an accounting herein.

During discovery, Plaintiff had failed to admit upon request by Defendant Beech that the horse "Rambler's Image B" was not "no-saled" prior to removal of that horse from the Beech auction ring. On the fifth day of trial such a stipulation was made, the court thereupon directed a verdict in Beech's favor and subsequently an award of $4,026.37 was made pursuant to Rule 37(c) for the amount claimed by him as his reasonable expenses incurred in making proof of this fact denied upon request.

At the close of all the evidence, the jury instruction conference was held after argument of counsel and after instructions were given. Following the charge conference, supplemental and corrective charges were then delivered and the jury retired.

The Jury returned verdicts assessing compensatory and punitive damages against Defendant Thompson, finding that, although Defendants Martin and Brandon were sub-agents of Plaintiff, they did not breach their duty to Plaintiff. (A. 19).

QUESTIONS PRESENTED

I. At pre-trial conference may the District Court Judge, by threatening to impose "sanctions", compel counsel to stipulate to facts advanced by opposing counsel when the refusal to so stipulate is occasioned by an absence of information to "dispute" or "disprove"

those facts and a desire to test the credibility of the ultimate proponent of those facts?

II. May the District Court properly tax all costs and attorneys' fees pursuant to Rule 37(c), Federal Rules of Civil Procedure when the request for admission involved is not dispositive of all issues being tried?

III. Was Plaintiff materially prejudiced by the District Court's failure to honor the mandate of Rule 51, Federal Rules of Civil Procedure, that it inform counsel of its action upon requested instructions prior to argument to the jury?

REASONS FOR GRANTING THE WRIT

I. The pre-trial conference procedure employed by the District Court was abusive and to the extent it followed the Court's local rule, that rule is violative of Rule 83, Federal Rules of Civil Procedure.[1]

Plaintiff's objection to the extraordinary pre-trial

[1] Pursuant to the Court's order, counsel for Plaintiff met informally with counsel for Defendants. Numerous stipulations of fact were agreed upon in a good faith effort to simplify the trial of claims, the complexities of which were made abundantly clear through Plaintiff's prayers for equitable accounting or the engagement of a Master. Plaintiff had undertaken extensive discovery which was impeded throughout by the fact that Defendant Thompson had virtually no records regarding the disposition of Plaintiff's horses.

The Court was not satisfied with the product of informal conferences and directed that additional effort be made to arrive at further stipulations. Thereupon followed a series of meetings covering two full days. Each such meeting was terminated by counsel for Plaintiff's statement that no further agreements could be reached. At that point, the trial judge was summoned. Counsel for Defendants would then submit to the Court requested admissions of fact. The Court would then inquire as to what information Plaintiff had which would "disprove" facts as advanced by Defendants.

The gist of each such engagement with the Court was that if Plaintiff did not stipulate to facts which could not then be disproven, "sanctions" would be imposed upon counsel for Plaintiff.

procedure was noted in a supplement to the Pre-trial Order which read:

> The Plaintiff is unable to disprove various assertions of fact advanced by the Defendants and can neither admit or deny them.

There is ample authority showing that the trial court here overstepped the bounds of judicial restraint. *Tobin* v. *Chambers Construction Co.*, 106 F.Supp. 473 (Neb., 1952); *Padovani* v. *Bruchhauser*, 293 F.2d 546 (2nd Cir., 1961); *Payne* v. *S. S. Nabob*, 302 F.2d 803 (3rd Cir., 1962).

Certainly it is indefensable for the Court to make suggestions which convey to counsel the unmistakable impression that imprisonment is the price of failure to make admissions.

If prejudice to Plaintiff need to be shown, at issue here were questions of fraud, conspiracy, secret profits, self-dealing and wanton breach of contract. On such questions, the credibility of witnesses is of paramount importance.

Counsel for Plaintiff admitted at the pre-trial conference that Plaintiff had developed no "evidence" to "dispute" or "disprove" certain alleged facts. Counsel had, however, through the course of extensive discovery developed substantial subjective doubts as to the veracity of certain of the Defendants. It was and still is counsel's position that certain of the "facts" which were stipulated to under compulsion of "sanctions" would not have been susceptible to belief when produced through testimony before the jury.

In essence, having been required to try this somewhat confusing claim to a jury, the Plaintiff was denied the benefit of having the jury weigh the credibility of a significant portion of the evidence.

Further compounding Plaintiff's problem at trial were the Court's consistent and emphatic rulings that no inquiry would be permitted in areas overlapping the stipulations.

II. The record demonstrates that Plaintiff's claim against the Defendant Beech was twofold. First, Plaintiff contended that Beech did have instructions not to sell "Rambler's Image B" prior to the auction of that horse. Second, Plaintiff argued that Beech's agent, Mrs. Wiggins, was allowed to execute and deliver registration papers to Mrs. Wallace Brandon despite the fact that Plaintiff's written authorization to do so had been orally revoked.

When, during trial, it was stipulated that "Rambler's Image B" was not "no-saled" prior to its removal from the ring, Plaintiff still contended that Beech's willing execution of registration papers, despite Plaintiff's revocation of authority, was, standing alone, a judicially cognizable injury to Plaintiff.

Thus, even if "Rambler's Image B" was, as a matter of law, sold at auction, Beech's unauthorized execution of registration papers following revocation of the power of attorney was a separate and distinct injurious act.

The District Court found this particular issue to be "moot" and subsequently taxed against Plaintiff Beech's costs pursuant to Rule 37(c), Federal Rules of Civil Procedure.

Beech's testimony was that he did not believe that Defendant Thompson, as Bradshaw's agent, was authorized to sign Bradshaw's name on the registration papers, and that Mr. Beech's secretary had written Mr. Bradshaw seeking authority to sign transfer papers on his behalf. (Tr. Vol. III, pp. 66-67). Beech further testified that horses can be and sometimes are sold without registration papers, and that the terms of his auction sale are that he disclaimed any obligation to register horses, although he may assist in registration. (Tr. Vol. III pp. 71-72).

In granting Beech's Motion to Dismiss after entry into the "crucial" stipulation, the Court stated that there was insufficient evidence to find that Beech was Bradshaw's sub-agent, that Beech therefore had

no fiduciary duty of agency to Bradshaw and "any claimed breach by any employee of Mr. Beech in relation to Mr. Bradshaw's power of attorney becomes moot". (Tr. Vol. III, pp. 167).

It is readily apparent from the above that the Court was cognizant of the full thrust of Plaintiff's claims against Beech. In effect the Court seems to have found the issue of direct agency to be "moot" upon its conclusion that there was no duty owed arising out of sub-agency.

The refusal to earlier admit that the horse had not been "no-saled" prior to its removal from the ring, had absolutely no bearing upon Beech's refusal to honor the revocation of the direct agency characterized by the Court as power of attorney vis-a-vis the registration papers. An earlier admission would not have oviated a trial.

The Court's award of $4,026.37 was based upon the affidavit of Beech's counsel itemizing the hours spent in preparation for and attendance at trial, together with a list of costs incurred.

The purpose of the rule is to allow recovery for the cost of proving facts set out in the request for admissions. There is no manner in which the rule can be read to allow a general recovery for defense of all issues and advancement of cross-claims. Courts have often declined to assess expenses in making proof where the time and expense of making such proof was trivial. *Bateman* v. *Standard Brands, Inc.*, 9 F.R.D. 555 (W.D. Mo., 1949); *Breffort* v. *I Had A Ball Co.*, 271 F. Supp. 623 (So. D.N.Y., 1967); *McHugh* v. *Reserve Mining Co.*, 27 F.R.D. 505 (No. D. Ohio, 1961).

In fact, when the issue of no-sale was here raised at trial, both counsel for Plaintiff and the Court were of the impression that it had earlier been conceded by stipulation. (Tr. Vol. III, pp. 72-73). Doubtless counsel and the Court had in mind stipulation "uu" which provided:

On the night of October 16, 1968, the auctioneer announced the completion of the sale of Rambler's Image B in the customary manner.

Plaintiff's lack of information and his demonstration of good faith upon subsequently obtaining such information should have been considered below. *Garrison v. Warner Bros. Pictures, Inc.*, 226 F.2d 354 (9th Cir., 1955), cert. den. 76 S. Ct. 438, 350, U.S. 968 100 L.Ed. 841.

The Court of Appeals apparently overlooked stipulation "uu" and Plaintiff's direct agency/power of attorney claim, since that Court found the taxation of costs proper in light of its characterization of Beech's defense as being entirely directed toward establishing the fact that the horse had not been "no-saled" prior to its removal from the auction ring.

III. Immediately following the close of all evidence, the Court required counsel to make closing argument to the jury. (Tr. Vol. IV, pp. 18-19). Previously, the Court had admonished counsel, ". . . it may be embarrasing to you, and might be detrimental to your client's cause if anyone undertook to discuss the law with the jury." (Tr. Vol. III, pp. 373-374). The Court assisted counsel in this regard by requiring argument to the jury without informing counsel of its intended jury charges. In fact, no charge conference or consultation with counsel concerning charges was held until after the jury was charged.

Such procedure is violative of the clear mandate of Rule 51, Federal Rules of Civil Procedure, which provides:

> The court shall inform counsel of its proposed action upon their request prior to their argument to the jury, but the court shall instruct the jury after the arguments are completed.

Both the District Court and the Circuit Court of Appeals found no material prejudice resulting from the Court's unorthodox procedure.

Such prejudice is clearly apparent in the record. Despite the fact that the jury found the Defendants

Martin and Brandon to be sub-agents of Bradshaw and despite the fact that the stipulations and testimony clearly showed that Martin and Brandon dealt with Plaintiff's horses for their own profit, the jury nevertheless found no liability on the part of Martin and Brandon. Especially in a case involving submission of issues to a jury upon a special verdict, counsel should be able to shape closing argument with prior knowledge as to the content of jury charges.

The clear spirit and intent of the Rule is to allow counsel the opportunity to submit the matter to the jury in as logical a fashion as is possible. The procedure followed here: closing argument-instructions to jury-charge conference-further charge to jury (without supplemental closing argument), is the least logical means of submission to the jury and should be found materially prejudicial as a matter of law. *Downie* v. *Powers*, 193 F.2d 760 (10th Cir., 1951).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition and Appendix has been furnished by mail this 18th day of July, 1972, to the following: Knox Bigham, Bigham & Binkley, First National Bank Building, Lewisburg, Tennessee 37091; Jack Irion, Bomar, Shofuer, Bomar & Irion, Peoples National Bank Building, Shelbyville, Tennessee 37160; James C. Burns, Jr., P. O. Box 167 Shelbyville, Tennessee 37160; Ben Kingree, III, Bobo, Tarpley & Kingree, First National Bank Building, Shelbyville, Tennessee 37160; Ronald T. Wilson, Cobb & Wilson, 111 South Main Street, Shelbyville, Tennessee 37160.

Gregory A. Presnell

GREGORY A. PRESNELL

APPENDIX

No. 71-1131

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

C. E. BRADSHAW, SR.	*Appellant*	APPEAL from the United States District Court for the Eastern District of Tennessee.
v.		
VIC THOMPSON, ET AL.	*Appellees*	

Decided and Filed January 20, 1972.

Before: EDWARDS, PECK and MILLER, Circuit Judges.

PECK, Circuit Judge. This case arose from an agency contract between the plaintiff-appellant, C. E. Bradshaw, a resident of Florida, and the defendant-appellee, Vic Thompson, a resident of Tennessee. The contract provided that Thompson was to sell some 60 Tennessee Walking Horses owned by Bradshaw at the best and highest cash price; that he was to house, feed and care for them; that the title to all horses was to remain in Bradshaw's name until after the sale; and that any check obtained by Thompson for the sale of any horse was to be made payable by the purchaser to Bradshaw, who would then remit to Thompson by separate check a twenty-five percent commission. Finally, the contract listed various items of equine tack belonging to Bradshaw which Thompson agreed to return upon termination of the agreement. The contract was signed and the horses were shipped to Thompson for sale in Tennessee.

Thompson then contracted with and delivered certain horses to the defendants-appellees Wallace Brandon and Joe Martin

for the purpose of assisting in the sale of the horses. The remainder of the horses were retained by Thompson, and were disposed of in various ways: some were sold to purchasers who remitted checks payable to Bradshaw as contemplated by the contract; some were given away by Thompson as additional commission for assisting in the sale of other horses; some were sold on credit; some were traded to third parties in exchange for other horses; some were sold for cash or for check made payable to Thompson; some were sold to a partnership consisting of various named defendants; some were sold at public auction and purchased by Thompson or by one or more of the other defendants; some were sold directly to Brandon who eventually resold them; and some horses died while in the possession of Thompson. The appellees produced no records of any of these transactions, other than a few bank deposit slips. By October of 1968, all but approximately 21 of the horses had been disposed of. These remaining horses were entered by Thompson in the Murray Farm Sale, a public auction owned and operated by the defendant Beech.

When the appellant became aware that he could not ascertain what was happening in Tennessee to his horses, he filed this action in the District Court for the Eastern District of Tennessee basing jurisdiction on diversity of citizenship. In his original complaint, Bradshaw made allegations of fraud, conspiracy, breach of contract and breach of fiduciary duty, and requested a trial by jury. This complaint was later amended to delete the jury request and to include a request for an equitable accounting. The defendants contended that the action was one at law and requested a jury trial. The case was severed, and on the issue of liability, the jury found that Thompson, Brandon and Martin were all duly appointed agents and sub-agents of Bradshaw, but that only Thompson had breached his fiduciary duty to his principal. The issue of damages was then tried to the jury, and an award of $12,323.27 compensatory and $1,000.00 punitive damages was made against Thompson.

The appellant's prime contention on appeal is that the Court erred in submitting the case to the jury. He insists that his action is purely equitable and that only through an accounting will he be able to determine what sums are owed to him, but the existence of an agency relationship does not automatically entitle the principal to an accounting, nor does a prayer for an accounting automatically take the case away from the jury. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1961), *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). The law on this first point is accurately summarized by the comment to § 399(e) of the Restatement of Agency:

> [U]nless there is such a complication of accounts that it is difficult for the machinery of the law courts to cope with them, the principal ordinarily cannot bring an action in equity for money due; if his remedy otherwise would be solely in the courts of law, he cannot bring an action for an account merely on the ground of the agency relation.

In *Dairy Queen, Inc.* v. *Wood*, the Supreme Court noted that insofar as the complaint requested a money judgment, it presented a claim which was unquestionably legal. The fact that the complaint was cast in terms of an accounting rather than in terms of an action for debt or damages did not alter the right to a trial by jury. 396 U.S. at 476. See also *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. at 503-04, 514, (dissenting opinion) (1959). The problem of the instant case seems to have been anticipated by the Court when it commented in *Dairy Queen* upon the broad powers of discovery now available in suits at law:

> Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them. In view of the powers given to District Courts by Federal Rule

of Civil Procedure 53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met. 369 U.S. at 478.

The appellant sought recovery from Thompson for damages arising out of an alleged breach of contract. He alleged, among other things, that Thompson fraudulently withheld and concealed portions of the consideration which was the subject matter of the contract. He sought compensatory damages, including all commissions paid by appellant, lost profits for Thompson's failure to obtain the best and highest cash price for the animals, and punitive damages for fraud. These claims are unmistakably legal, and the defendants were entitled to a jury trial on all contested issues of fact. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959).

The leading opinion subsequent to *Beacon Theatres* and *Dairy Queen* appears to be *Thermo-Stitch, Inc.* v. *Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961). There it was held that ". . . the mere presence of an equitable cause furnishes no justification for depriving a party to a legal action of his right to a jury trial." 294 F.2d at 490-91. In a footnote to that opinion it is noted that the result of *Beacon Theatres* will be a sharp reduction in the number of cases in which trial by a court without a jury may be held. 294 F.2d at 491, n. 12. See also McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc.* v. *Westover*, 116 U. Pa. L. Rev. 1 (1967). The availability of declaratory judgments and the liberal discovery procedures of the Federal Rules operate to make the legal remedies more "adequate" than before. This case is an example of that fact.

The appellant obtained by discovery all information to which he could have been entitled in an accounting. Information concerning the disposition of each horse, including purchase price, name of purchaser and the consideration received was

obtained and was set forth in the pretrial order. Furthermore, the Court allowed the appellant a reasonable time after the jury had reported its verdict to request any further equitable accounting from Thompson. No request was ever received.

An accounting is a species of disclosure, predicated upon the legal inability of a plaintiff to determine how much, if any, money is due him from another. It is an extraordinary remedy, and like other equitable remedies, is available only when legal remedies are inadequate. We find no basis for disturbing the District Court's conclusion that the procedures of the Federal Rules for causes at law were fully adequate to provide the relief sought by the appellant.

The appellant contends that the duty of the defendants Thompson, Brandon and Martin to render an accounting arose when the jury found that they were duly appointed agents and sub-agents of the appellant. He contends that he had shown that the defendant Martin had purchased several of his horses at the Murray Farm Sale, thereby breaching the duty of an agent not to purchase the property of his principal which has been entrusted to him to sell, and that this breach of fiduciary duty by his sub-agent gives him a right to an accounting. We cannot agree with this contention. As pointed out earlier, the existence of an agency relationship does not automatically entitle the principal to an accounting. Furthermore, it was stipulated that Martin's responsibility as a sub-agent terminated upon the return of the horses to Thompson at the Murray Farm Sale. Thus, by the terms of the agreement, the sub-agency relationship terminated prior to any purchase by Martin at the auction. The rule that an agent employed to sell property cannot himself become the purchaser at his own sale would not apply here, where the agent acquired an interest in the property by a bona-fide sale after the termination of the agency. *Robertson* v. *Chapman*, 152 U.S. 673, 683 (1894).

The appellant further contends that the Court abused its discretion in declining to appoint a master to assist the jury. The decision to appoint a master whose function is to aid the

judge in the performance of specific judicial duties, is within the discretion of the District Court. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957). The fact that "a case involves complex issues of fact or law is no justification for reference to a Master, but rather is an impelling reason for trial before an experienced judge." *Bartlett-Collins Co.* v. *Surinam Nav. Co.*, 381 F.2d 546, 551 (10th Cir. 1967); see also *In Re Watkins*, 271 F.2d 771 (5th Cir. 1959). The overall mandate of Rule 53(b) is that reference to a master is to be the exception and not the rule. Actions for fraud are particularly inappropriate for reference to a master, "save in extraordinary or exceptional cases." *Irving-Austin Bldg. Corp.* v. *Cunningham*, 100 F.2d 574 (7th Cir. 1938). We find no abuse of discretion in the Court's refusing to appoint a master to assist the jury.

The appellant's claim against the defendant Beech differs substantially from his claims against the other defendants, and it can be considered separately. On the night of October 16, 1968, one of Brawshaw's horses, "Rambler's Image B," was purchased at the Murray Farm Sale by Mrs. Wallace Brandon. The purchaser did not pay for the horse that night, and the transfer papers were not executed until the following morning. On the morning of October 17, prior to the execution of those papers, the appellant phoned Miss Wiggins, an employee of Beech, and instructed her that the sale was not to be completed because the value of the horse had been depressed because the horse had been led rather than ridden through the sale ring. Nevertheless, Miss Wiggins was instructed by Beech to sign over the title papers to the purchaser.

The appellant's contention that the transfer of these papers was a violation of the power-of-attorney relationship which had been created to allow Miss Wiggins to complete these sales for the appellant belies a misunderstanding of the sale. All the rights, duties and obligations of the Beech-Bradshaw relationship arose out of contract. Section 2-328(2) of the Uniform Commercial Code, adopted in Tennessee as T.C.A. § 47-2-328(2), governs all sales made by auction and is disposi-

tive of the issue concerning the sale of the horse "Rambler's Image B." This section provides that "a sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner . . . ." The "customary manner" of this particular auction is set forth in boldface type in the sale catalogue published by Murray Farm:

> Cosigners will have the privilege of no sale if they do not wish to sell for the last bid on the animal, however, let it beknown [sic] before leaving the sale ring.

Thus a seller could withdraw a horse from sale even after the fall of the hammer, but only before the horse was taken from the sale ring. When this horse was taken from the ring after being sold, all title and interest passed to the purchaser. Thereafter, Beech's authority in the horse was terminated, as was Bradshaw's, and the seller was required to do all that was necessary to conclude the transaction. The delivery of papers providing evidence of ownership was not necessary to pass title. The District Court did not err in directing a verdict in favor of Beech.

Nor can we find any abuse of discretion in the award of costs in favor of Beech under F.R.C.P. 37(c). On August 6, 1969, prior to trial, Beech served on the appellant a request to admit that neither Bradshaw nor anyone on his behalf let it be known before the horse left the sale ring that the appellant desired to "no sale" the horse. This request was denied by the appellant, both in his pleadings, and at the pretrial conference. On June 29, 1970, the fifth day of the trial, the appellant finally stipulated:

> . . . neither Beech nor any representative of Murray Farm was advised by the plaintiff or any of his agents or employees that Rambler's Image B was to be no saled prior to the time that the horse was taken from the sale ring after being auctioned on the night of October 16, 1968.

At this point, the Court directed a verdict in Beech's favor. An award of $4,026.37 was made pursuant to Rule 37(c) to Beech for the amount claimed by him as his reasonable expenses incurred in making proof of this fact denied upon the request for admissions. This rule requires the Court to award expenses including reasonable attorney's fees to a party whose request for the admission of the truth of any matter under Rule 36 is denied and who thereafter proves the truth of the matter, unless any one of four conditions is found to exist. The District Court found that none of the four enumerated conditions was present in this case, and we will not disturb that finding, and we do not find any abuse of discretion in the amount of the award. The determinative fact upon which Beech's liability would depend was whether he had received a no sale instruction from the appellant *before* the horse had been taken from the ring, and the entirety of Beech's defense was directed toward establishing this one fact.

The appellant also objects to the District Court's refusal to inform counsel of its intended jury charges prior to the closing arguments as required by Rule 51. The Court noted only that "mechanical and administrative reasons" existed for this failure. Although this does not satisfy the unconditional mandate of the rule, noncompliance does not warrant a new trial unless material prejudice is shown to exist. *Hardigg* v. *Inglett*, 250 F.2d 895 (4th Cir. 1957). Appellant has failed to show that material prejudice resulted because of the failure of the District Court to comply with this aspect of Rule 51, and therefore the order of the District Court is, in all respects, affirmed.

JUDGMENT

(Filed July 2, 1970)

This action came on for trial before the Court and a jury, Honorable C. G. Neese, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, as to the alleged civil conspiracy.

It is Ordered and Adjudged:

1. Mr. Thompson did breach his agreement with Mr. Bradshaw beyond his admitted breach regarding the tack and the sum of $8,823.27.

2. (a) The defendants - by - cross claim did not directly cause Mr. Beech losses of time and expense in connection with this lawsuit.

3. (a) Mr. Thompson did have the implied authority under his agreement with Mr. Bradshaw to employ subagents.

(b) Mr. Martin was appointed by Mr. Thompson as the subagent of Mr. Bradshaw.

(c) Mr. Martin did not breach his duty as a subagent of Mr. Bradshaw.

(d) Mr. Brandon was appointed by Mr. Thompson as the subagent of Mr. Bradshaw.

(e) Mr. Brandon did not breach his duty as a subagent of Mr. Bradshaw.

4. (a) Mr. Martin, Mr. Short and Mr. Brandon did not conspire together or with someone else to induce Mr. Thompson to breach his agreement with Mr. Bradshaw.

5. (a) Mr. Thompson, Mr. Short and another person did form a partnership in connection with certain of the horses of Mr. Bradshaw.

(b) The partnership of which Mr. Short was a member did not intend to defraud Mr. Bradshaw in connection with such horses.

Dated at Winchester, Tennessee, this 2nd day of July, 1970.

Karl D. Saulpaw, Jr.
Clerk of Court

/s/Agnes Hawkins
Deputy Clerk

JUDGMENT ON JURY VERDICT

(Filed July 2, 1970)

This action came on for trial before the Court and a jury, Honorable C. G. Neese, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict as to damages by virtue of the breach of contract by the defendant Mr. Thompson,

IT IS ORDERED AND ADJUDGED:

1. That the defendant Mr. Thompson owes the plaintiff Mr. Bradshaw $12,323.27 in compensatory damages.

2. That the plaintiff Mr. Bradshaw is entitled to punitive damages from the defendant Mr. Thompson.

3. That the defendant Mr. Thompson owes the plaintiff Mr. Bradshaw $1,000.00 in punitive damages.

All other matters herein are reserved.

Dated at Winchester, Tennessee, this 2nd day of July, 1970.

Karl D. Saulpaw, Jr.
Clerk of Court

/s/Agnes Hawkins
Deputy Clerk

FILE COPY

Supreme Court, U. S.
FILED
AUG 10 1972
MICHAEL RODAK, JR., CLERK

IN THE

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October Term, 1972

No. 72-106

C. E. BRADSHAW, SR.
Petitioner

vs.

VIC THOMPSON, et al.
Respondents

On Petition for the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE RESPONDENT, S. W. BEECH, JR.

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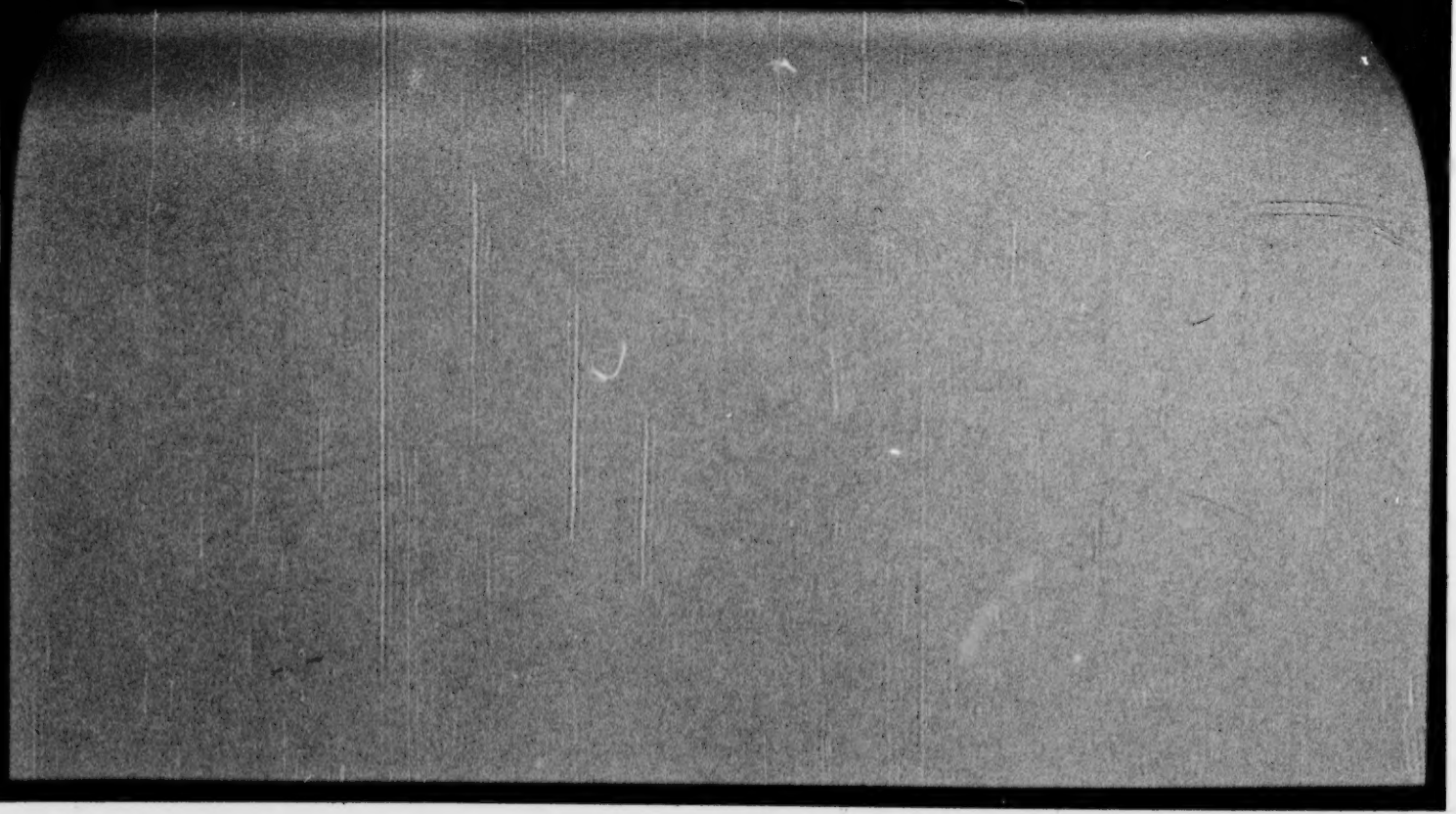

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-106

C. E. BRADSHAW, SR.
Petitioner

vs.

VIC THOMPSON, et al.

Respondents

On Petition for the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE RESPONDENT, S. W. BEECH, JR.

OPINION BELOW

The opinion of the Court of Appeals is now reported at 454 F. 2d 75.

QUESTIONS PRESENTED FOR REVIEW

This Respondent, S. W. Beech, Jr., one of the Defendants below, is not involved in the controversy posed by Questions I and III in the Petition.

The Petitioner was not required or compelled to stipulate to any facts advanced by Mr. Beech that Petitioner was unwilling to stipulate.

Before the case was submitted to the Jury the District Court directed a verdict in favor of Mr. Beech and the question of his liability to the Petitioner was never submitted to the Jury.

Question No. II as posed in the Petition relates to Mr. Beech and only to Mr. Beech.

STATEMENT OF THE CASE

Jurisdiction of the District Court was founded upon diversity of citizenship and amount in controversy. The substantive law of the State of Tennessee governed.

A statement of the essential facts is contained in the Opinion of the Court of Appeals, reported at 454 F. 2d. 75. (The reported opinion of the Court of Appeals contains a typographical error at 454 F. 2d. 80, in the quotation from the catalogue published by Murray Farm. The word rendered "Cosigners," should be "Consignors").

ARGUMENT

The Petition for Certiorari as it relates to Mr. Beech:

1. Does not present any question under the Constitution of the United States.

2. Does not present any question under any statute of the United States.

3. Does not present a case where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

4. Does not present a case where a Court of Appeals had decided an important State or territorial question in a way in conflict with applicable State or territorial law.

This case does not call for a construction of Rule 37 (c), Federal Rules of Civil Procedure. The question is:

"II. May the District Court properly tax all costs and Attorneys' fees pursuant to Rule 37 (c), Federal Rules of Civil Procedure *when the request for admission involved is not dispositive of all issues being tried?*" Emphasis supplied.

The United States District Court for the Eastern District of Tennessee and the United States Court of Appeals for the Sixth Circuit have both held, as a matter of substantive State law, that the Request for Admission involved was dispositive of all issues being tried between Mr. Bradshaw and Mr. Beech. The Petition for Certiorari cites no authority to the contrary.

At page 8 of the Petition the Plaintiff implies a lack of information and a demonstration of good faith upon subsequently obtaining such information. This implication is without support in pleading or proof.

The real question attempted to be presented by the Petition for Certiorari involves the determination of a question of State, rather than Federal law, and the Petition does not complain of the determination made on that question of State law by the lower Courts.

CONCLUSION

For the reasons stated, Certiorari should be denied.

Respectfully submitted,

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